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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, Plaintiff, v. JAMES D. CROSS, BASF CORPORATION OF AMERICA, THE GLIDDEN COMPANY, OXY USA, INC., THE SHERWIN WILLIAMS COMPANY, SPECIALTY COATINGS COMPANY, INC., KRUEGER RINGIER, INC. Defendants.	CIVIL ACTION NO. 89-2306 Judge Baker Magistrate Kauffman
BASF CORPORATION OF AMERICA, et al. Third-Party Plaintiffs, v. ACME PRINTING INK COMPANY, et al. Third-Party Defendants.	
ALLIED-SIGNAL, INC., et al. Fourth-Party Plaintiffs, v. BALL CORPORATION, et al. Fourth-Party Defendants.	

**MEMORANDUM OF THE UNITED STATES
IN SUPPORT OF
MOTION FOR ENTRY OF PROPOSED CONSENT DECREE**

I. INTRODUCTION

The plaintiff United States, one defendant and all eleven third-party defendants ("Settling Parties")[1], have tendered to the Court a proposed Consent Decree which resolves claims by the

[1] Third-parties are Allied-Signal, Inc.; Bagcraft Corporation of America; Ball Corporation; Beazer East, Inc.; Container Corporation of America; R.R. Donnelley and Sons, Co.; Federated Paint Manufacturing Co., Inc.; Grow Group, Inc.; ZENECA Inc.; INX International Ink Co.; Perry Printing Corporation; and defendant is Krueger Ringier Inc.

United States for recovery of costs brought pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607. The proposed Consent Decree provides for the payment to the United States by the settling parties of $2,942,232. This amount covers all of the United States' past response costs at the Cross Brothers Pail (Pembroke) Site, Pembroke Township, Kankakee County, Illinois, and the estimated future costs of the United States to oversee future performance of the remedy for the site. Entry of the decree will resolve all of the United States' claims for past and future costs alleged in the Complaint in this action.

The United States calculated that the settling parties were responsible for a 40% share of hazardous waste sent to the site. The settlement amount represents forty percent of total past and estimated future response costs associated with the site. In addition, the settling parties have agreed that if the U.S. Environmental Protection Agency ("EPA") determines that certain future environmental response actions are necessary at the site, settling parties shall pay their portion of such additional response costs. The Consent Decree provides the settling parties with a covenant not to sue and recites that settlors are entitled to CERCLA's protection from contribution actions.

Four non-settling defendants ("non-settlors") have filed comments (Attachment A) to the decree. Their major objections are that they were not included in the Consent Decree, that the United States' allocation of responsibility among the settling

and non-settling parties was incorrect, that the United States' estimate of the cost of the remedy was inaccurate, and that the partial Consent Decree will not eliminate all future litigation in this case. Their objections are without merit.

Before entering into this Consent Decree, the United States made an intensive review of the evidence to arrive at a fair and impartial allocation of responsibility for waste sent to the site by settling and non-settling parties. The United States also made an accurate estimate of the cost of the remedy, based on an estimate by an EPA contractor and consistent with estimates from non-settlors themselves. The settlement amount of $2.9 million was thus a fair and reasonable sum.

The non-settlors had four years in which to settle their liability for remedial action and costs with the United States, and despite inquiry from the United States failed even to initiate settlement discussions. The non-settlors were also unable to reach an agreement with the settling parties. Indeed, it appears that the non-settlors have been unable to reach an agreement among themselves for settlement of their joint and several liability. Moreover, the United States had additional matters to settle with non-settlers, which were not covered by this Consent Decree, and which would have warranted a separate settlement with non-settlors. Having failed totally at settlement with themselves and everyone else in this case, non-settlors now attempt to prevent the remaining parties from settling. The United States submits that this Consent Decree is

fair, reasonable and consistent with the goals of CERCLA, and should be entered.

II. BACKGROUND OF PROPOSED CONSENT DECREE

The Cross Brothers Pail (Pembroke) Site is a 20-acre parcel of land located 12 miles east of Kankakee, Illinois, in Pembroke Township. James and Abner Cross operated a pail and drum reclamation business at the Site from 1961 until 1980. Their operation involved placing drums and pails containing dye, ink, and paint residue onto the ground and allowing their contents to drain. Waste solvents were then poured over and into the pails and drums and ignited to dissolve any remaining residue.

The Illinois Environmental Protection Agency ("IEPA") discovered the site in June, 1980. An inspection found that the reclamation operation had resulted in a layer of waste residue up to 6 inches thick covering approximately 10 acres. Numerous pails and drums, and approximately 10 trenches containing crushed pails and drums, were found at various locations around the Site.

The Illinois Attorney General obtained a court order in 1980 requiring the Site to be closed and cleaned up. Pursuant to § 105 of CERCLA, 42 U.S.C. § 9605, the Site was placed on the National Priorities List, 40 C.F.R. Part 300, Appendix B. 48 Fed. Reg. 40658 (September 8, 1983). From May 1983 to June 1984, IEPA conducted a Remedial Investigation/Feasibility Study ("RI/FS") under a Cooperative Agreement with EPA. On March 25, 1986, EPA with IEPA's concurrence, signed a Record of Decision ("ROD") requiring Initial Remedial Measures ("IRM"), including

removing surficial and buried waste materials and visibly contaminated soils. The ROD also recommended an investigation of soil and groundwater to determine if additional remedial action was needed.

IEPA conducted the IRM in October and November, 1985, removing vegetation, 6,438 tons of surficial soil containing paint, ink, dye and tar-like residue, 56 tons of crushed pails, 542 drums containing waste, and 572 empty drums. IEPA also conducted a Hydrogeological Study/Feasibility Study ("HS/FS") from March 1987 to July 1989, using State funds. The HS/FS indicated the presence of hazardous substances within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14). These hazardous substances included polychlorinated biphenyls ("PCBs") in the unsaturated zone of the surface and subsurface soils and other organic contaminants in the groundwater in excess of maximum contaminant levels established pursuant to the Safe Drinking Water Act, 42 U.S.C. §§ 300f - 300j-11.

EPA, with IEPA concurrence, issued a second Record of Decision on September 28, 1989 which determined that groundwater and soil contamination should be remediated by groundwater collection, treatment and monitoring; soil flushing; installation of vegetative covering; and institutional controls. The non-settlors in this case were then given an opportunity to enter into a consent decree with the United States to perform the remedy and reimburse the United States' past costs; they failed to make an acceptable offer.

On February 9, 1990, after unsuccessful negotiations with the non-settlors, EPA issued a Unilateral Administrative Order ("UAO") pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606. (Attachment B) This Order required that the respondents, who are the non-settlors, perform Remedial Design/Remedial Action Work at the Site. The remedial design is virtually complete at this time, but the remedial action must still be performed. The United States also filed this cost recovery action on October 16, 1989, pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607. The suit sought recovery of response costs incurred by the United States in remediating the Site and a declaration that defendants were liable for costs yet to be incurred by the United States. The complaint named as defendants James Cross, Inmont Corp. (predecessor of BASF Corp.), Frederick Levey Co. (predecessor of OXY USA), Sherwin Williams, Glidden, and Specialty Coatings. In July 1991, the United States filed an Amended Complaint to add defendant Krueger Ringier.

The United States has incurred response costs in reimbursing the State of Illinois for conducting the Remedial Investigation/ Feasibility Study and Hydrogeological Study/Feasibility Study, in investigating, monitoring, assessing and evaluating releases at the Site, in taking enforcement action against potentially responsible parties, and in performing acts of oversight, administration, and inspection. In an October 1991 complaint and a 1992 amended complaint, the defendants named eleven of the settling parties as third-party defendants in this action.

During the course of this litigation, the United States periodically inquired of various non-settling defendants whether they would make a settlement proposal. During this time, defendants made no settlement proposal, nor even asked to meet with the United States to discuss settlement. While occasionally over the years, defense counsel informally advised that they expected to make a settlement offer, no such offer was forthcoming. Nor was the United States ever advised that any settlement between the non-settlors and settling parties, or among the non-settlors themselves, was imminent. Indeed, the United States understands that the settling parties will advise the Court that after months of negotiations, they were never able to narrow their differences with the non-settlers, and that a global settlement was never close when they decided to approach the United States to discuss settlement.

In contrast to the non-settlors' inaction, as the date for filing of dispositive motions approached in the summer of 1993, the third-party defendants did approach the United States with a good faith proposal to reimburse the United States' unreimbursed costs and settle this case. These settling parties, unlike the non-settlors, were not performing the remedy under EPA's UAO. Thus, a settlement with them was much simpler as it did not have to cover many additional issues related to performance of and liability for the remedial action. And even though defendant Krueger-Ringier was not in the initial third-party group tendering the settlement proposal, the United States included it

in the settlement since it was the only generator defendant not performing the remedy under the UAO, and thus in the same position as the settling third parties.

The United States then made an intensive effort to determine a rational, fair basis for settlement. The United States reviewed and analyzed not only the deposition and documentary evidence in its case against the defendants, but also similar evidence in the third-party action. Through this effort, the United States estimated the volume of hazardous waste contributed to the site by both the non-settlors and the settling parties. The settling parties' share amounted to approximately 40% of the total of such waste. The United States calculated, however, that the settling parties' settlement proposal was substantially less than their 40% share, and required that a settlement be based on this percentage of total costs. The Consent Decree requires the settling parties to pay 40% of total estimated site costs.

In addition to calculating the settling parties' percentage share, the United States also made its best estimate of the total past and future remedial costs for the site in order to determine a reasonable settlement amount. Upon completion of the Site remedy, response costs for the Site were expected to total approximately $7,390,000. This sum included past costs incurred by the United States, as of April 30, 1993, of $2,644,845, and prejudgment interest on past costs calculated through June 9, 1993. The total cost figure included the present value of EPA's future oversight costs of about $285,000 for reviewing

implementation of the Site pursuant to the UAO. Response costs for the Site also included the estimated costs for the non-settlors to implement the Site remedy and perform operation and maintenance for 15 years. This was expected to total approximately $4,446,000.

EPA had a sound basis for its estimate of total costs. Non-settlors had submitted to EPA a 95% complete remedial design for the remedial action at the site. This design document permitted EPA to make an accurate estimate of the remedy's final cost. EPA engaged an independent environmental contracting firm knowledgeable with the site to estimate the costs of the remedy based on the non-settlors' design. This estimate was consistent with non-settlors' own recent estimates of costs, and provided EPA with an adequate basis to support its estimate of site costs and the resulting settlement amount in excess of $2,942,000.

The non-settlors, who are performing the remedy under the UAO, are in a different legal position vis-a-vis the United States than the settlors. A settlement involving non-settlors' remedial action obligations, and ensuing potential claims against the United States, in addition to recovery of the United States' costs, would be a very different, more complicated settlement than the one before the Court. While the United States concluded that it was appropriate to include in this Consent Decree all parties not performing the remedy under EPA's UAO, the United States was certainly not uninterested in a separate, but different consent decree with the group of non-settlors. But it

takes two to settle. Unfortunately, while the non-settlors today profess interest in the abstract idea of settlement, they were unable during the last four years even to begin negotiations with the United States.

The proposed Consent Decree was lodged with this Court on August 13, 1993, pending a period for the public to comment on the Decree. Notice of the lodging of the Decree was published in the Federal Register, 58 Fed. Reg. 44855 (August 25, 1993), and during the thirty day comment period, three sets of comments were received from four non-settling defendants in this case. No comments were received from other persons.

III. THE PROPOSED CONSENT DECREE

The proposed Consent Decree resolves claims against the only defendant not a recipient of the UAO, Krueger Ringier, Inc., and all third-party defendants -- Allied Signal, Inc., Bagcraft Corporation of America, Ball Corporation, Beazer-East, Inc., Container Corporation of America, R.R. Donnelley & Sons Co., Federated Paint Manufacturing Company, Grow Group, Inc., ICI Americas, Inc., INX International Ink Company, and Perry Printing Corporation -- under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq. The proposed Decree provides for the payment to the United States by the settling parties of $2,942,232. (¶ 4)

The United States calculated that the settling parties were responsible for a 40% share of hazardous waste sent to the site. The settlement amount represents forty percent of total past and

estimated future response costs associated with the site. In addition, the settling parties agreed that if EPA determines that certain additional response actions are necessary at the site, the settling parties shall pay their portion of such additional response costs. (¶ 6)

The settling parties also covenanted not to sue or assert claims against the United States with respect to the site or the decree. (¶ 17) The United States in turn covenanted not to sue or take administrative action against the settling parties pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607, relating to the site, (¶ 13), except in certain situations set out in ¶¶ 14-16. The parties also agreed that the Settling parties are entitled to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2). (¶ 19)

The Consent Decree does not, however, concern the remedial action at the Cross Brothers Site, which is being done by non-settlors pursuant to EPA's UAO.

IV. ARGUMENT

A. CERCLA's Settlement Provisions

A fundamental goal of the CERCLA enforcement program is to facilitate voluntary settlements in order to expedite remedial actions, promote reimbursement of the Superfund, and minimize litigation. In the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. § 9601 et seq.), Congress recognized the importance of

entering into negotiations and reaching settlements with private potentially responsible parties ("PRPs") to allow them to conduct or finance response actions at hazardous waste sites. Unique among the nation's environmental laws, CERCLA includes extensive provisions for PRPs to perform remedial actions. Section 122(a) affords the United States the discretion to enter into an agreement with any person to perform response actions at a site. 42 U.S.C. § 9622(a). Section 122 authorizes the United States to conduct settlement negotiations, defines the scope of any settlement's covenant not to sue, and provides for public comment on proposed settlements. In addition, Section 122(d) requires that settlements involving implementation of remedial actions must be embodied in judicial consent decrees, subject to Court approval. Id. § 9622(d).

In Section 122 settlements, the United States may provide a settlor with a covenant not to sue regarding its liability for conditions at a site. 42 U.S.C. § 9622(c), (g)(2). Once a settlement is entered between a PRP and the United States, that PRP is protected by operation of law from liability to other PRPs that may seek contribution from the settlor. 42 U.S.C. § 9613(f)(2); e.g., United States v. Cannons Engineering Corp., 899 F.2d 79 (1st Cir. 1990); Akzo Coatings, Inc. v. Aigner Corp., 803 F. Supp. 1380 (N.D. Ind. 1992); United States v. Rohm & Haas Co., 721 F. Supp. 666, 699-700 (D.N.J. 1989), appeal dismissed, No. 89-6005 (3d Cir., Feb. 28, 1990); In re Acushnet River & New Bedford Harbor Litig., 712 F. Supp. 1019, 1032 (D.Mass. 1989);

City of New York v. Exxon Corp., 697 F. Supp. 677, 683 (S.D.N.Y. 1988).

1. The Law and Public Policy Favor Settlements

"Public policy strongly favors settlements of disputes without litigation." Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1372 (6th Cir. 1976), cert. denied, 429 U.S. 862. As the court in Aro stated:

> Settlement agreements should . . . be upheld whenever equitable and policy considerations so permit. By such agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before overburdened courts, and to the citizens whose taxes support the latter. An amicable compromise provides the more speedy and reasonable remedy for the dispute.

531 F.2d at 1372. See also Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (upholding entry of consent decree under the Clean Water Act), cert. denied sub nom, Union Carbide Corp. v. Natural Resources Defense Council, Inc., 467 U.S. 1219 (1984).

The consent decree is a "highly useful tool for government agencies," for it "maximizes the effectiveness of limited law enforcement resources" by permitting the government to obtain compliance with the law without lengthy litigation. United States v. City of Jackson, 519 F.2d 1147, 1151 (5th Cir. 1975); see also SEC v. Randolph, 736 F.2d 525, 528 (9th Cir. 1984) ("use of consent decrees encourages informal resolution of disputes, thereby lessening the risks and cost of litigation"); United States v. Hooker Chemicals & Plastics Corp., 540 F. Supp. 1067, 1080 (W.D.N.Y. 1982) (approving CERCLA decree will save

"considerable time, money and effort in litigation"); Moch v. East Baton Rouge Parish School Bd., 533 F. Supp. 556, 559 (M.D. La. 1980) (consent decree is "a useful tool for federal governmental agencies who are charged with enforcing particularly the civil rights laws . . . since the government itself may avoid the risks as well as the cost of full scale litigation").

The public policy favoring settlements of government claims by consent decree is particularly applicable in CERCLA enforcement actions. The Sixth Circuit recently stated:

> Moreover, we are faced with a presumption in favor of voluntary settlement. That presumption is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA which enjoys substantial expertise in the environmental field.

United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1436 (6th Cir. 1991).

An explicit statutory goal of the CERCLA enforcement program is to facilitate voluntary settlements in order to expedite remedial actions, place the costs of remediation on responsible parties while conserving and reimbursing the Superfund, and to minimize litigation. See e.g., United States v. Acton, 733 F. Supp. 869, 872 (D.N.J. 1990). In the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. § 9601 et seq.), Congress "authorized a variety of types of settlements which the EPA may utilize in CERCLA actions, including consent decrees for PRPs to contribute to cleanup costs and/or to undertake response activities

themselves." United States v. Cannons Engineering Corp., 899 F.2d 79, 85 (1st Cir. 1990).

2. The Standard for Review of the Consent Decree Is Whether It Is Fair, Reasonable, and Consistent With the Goals of CERCLA

Review of a consent decree is committed to the informed discretion of the trial judge. United States v. Hooker Chemical & Plastics Corp., 776 F.2d 410, 411 (2d Cir. 1985) ("test for affirmance [of CERCLA consent decree]. . . is abuse of discretion"). This discretion should be exercised to further the strong policy favoring voluntary settlement of litigation. Id. (in CERCLA cases there is a "well-established policy of encouraging settlements"). See also Citizens for a Better Environment v. Gorsuch, 718 F.2d at 1126 ("trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate"); United States and Missouri Coalition for the Environment v. Metropolitan St. Louis Sewer Dist., Civil No. 88-543C(4) (E.D. Mo. July 13, 1990) ("standard of review of consent decrees has been articulated as whether the decree is fair, reasonable, and adequate"), citing Van Horn v. Trickey, 840 F.2d 604, 606 (8th Cir, 1988), quoting from Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1975), cert. denied, 423 U.S. 864 (1975); Donovan v. Robbins, 752 F.2d 1170, 1177 (7th Cir. 1985) (whether settlement is "fair, reasonable and adequate.")

Although a consent decree, as a judicial act, requires approval, "the court's role is a limited one." Harris v. Pernsley, 654 F. Supp. 1042, 1049 (E.D. Pa. 1987), aff'd, 820 F.2d 592 (3d Cir. 1987), cert. denied, 484 U.S. 947.

> The court may either approve or disapprove the settlement; it may not rewrite it. See Armstrong v. Board of School Directors, 616 F.2d 305, 315 (7th Cir. 1980); In re Real Estate Title and Settlement Services Antitrust Litigation, MDL Docket No. 633, Slip Op. at 29 (E.D. Pa. June 10, 1986) (Van Artsdalen, J.).

654 F. Supp. at 1049. The controlling criterion is reasonableness and fairness, not what might have been agreed upon, nor what the district court believes might have been the optimal settlement.

> [S]ettlement of any litigation . . . is basically a bargained exchange between the litigants. . . [T]he judiciary's role is properly limited to the minimum necessary to protect the interests of . . . the public. Judges should not substitute their own judgment as to the optimal settlement terms for the judgment of the litigants and their counsel.

Armstrong v. Board of School Directors, 616 F.2d 305, 315 (7th Cir. 1980). See SEC v. Randolph, 736 F.2d at 529 (district court should not condition approval of decree "on what it considered to be the public's best interest. Instead, the court should have deferred to the agency's decision that the decree is appropriate and simply ensured that the proposed judgment is reasonable" [emphasis in original]).

Where a court is reviewing a consent decree to which the government is a party, the balancing of competing interests affected by a proposed consent decree "must be left, in the first instance, to the discretion of the Attorney General." United

States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981), cert. denied, 454 U.S. 1083; see also Sam Fox Publishing Co. v. United States, 366 U.S. 683, 689 (1961) ("sound policy would strongly lead us to decline . . . to assess the wisdom of the Government's judgment in negotiating and accepting the . . . decree . . . in the absence of bad faith or malfeasance"); United States v. Associated Milk Producers, Inc., 534 F.2d 113, 117 (8th Cir.), cert. denied sub nom National Farmers' Organization, Inc. v. United States, 429 U.S. 940 (1976) (Attorney General must retain discretion in "controlling government litigation and in determining what is in the public interest").

The principle of deference to a settlement agreed to by the government is particularly important where the consent decree has been negotiated by the Justice Department on behalf of a federal administrative agency "specially equipped, trained and oriented in the field." United States v. National Broadcasting Co., 449 F. Supp. 1127, 1144 (C.D. Cal. 1978). In other words,

> Unless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved . . . [T]he courts should pay deference to the judgment of the government agency which has negotiated and submitted the proposed judgment.

SEC v. Randolph, supra 736 F.2d at 529. This is particularly true in a CERCLA case:

> Respect for the agency's role is heightened in a situation where the cards have been dealt face up and a crew of sophisticated players, with sharply conflicting interests, sit at the table.

United States v. Cannons Engineering Corp., supra 899 F.2d at 84.

Congress and the courts have identified three factors for a court to consider in reviewing a proposed CERCLA settlement. The legislative history for the 1986 amendments to CERCLA indicates that a court's role in reviewing a Superfund settlement is to "satisfy itself that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve." H.R. Rep. No. 253, Part 3, 99th Cong., 1st Sess. 19 (1985). United States v. Cannons Engineering Corp., supra 899 F.2d at 85 ("Reasonableness, fairness, and fidelity to the statute are, therefore, the horses which district judges must ride").

The Sixth Circuit Court of Appeals recently reaffirmed this standard: "When reviewing a consent decree, a court need only 'satisfy itself that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve.'" United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1424 (1991). It also stated that "[i]n evaluating the decree, it is not our function to determine whether this is the best possible settlement that could have been obtained, but only whether it is fair, adequate and reasonable." Id. at 1436.[2]

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[2] The three-part test of (1) fairness, (2) reasonableness, and (3) consistency with CERCLA's goals, is similar to the three-part test the courts used in evaluating settlements under CERCLA, prior to the 1986 amendments. United States v. Conservation Chemical Co., supra 628 F. Supp. at 400 (W.D. Mo. 1985) (reciting these same standards in pre-SARA CERCLA cases); United States v. Seymour Recycling Corp., 554 F. Supp. 1334, 1337-38 (S.D. Ind. 1982) (reciting same standards).

B. The Proposed Consent Decree is Fair

Fairness in the context of a CERCLA settlement has both procedural and substantive components. Cannons, 899 F.2d at 86. To measure procedural fairness, courts should look to the negotiating process and attempt to gauge its candor, openness and bargaining balance. Id. Substantive fairness dictates that settlement terms must be based upon, and roughly correlated with, an acceptable measure of comparative fault, apportioning liability among the settling parties according to rational estimates of the harm for which each is responsible. Id. at 87. Measured against these standards, the proposed settlement for the Cross Brothers Site is unquestionably fair.

Under the Consent Decree, the United States receives over $2.9 million, which covers all of its past costs and the estimated future costs to oversee future performance of the remedy. This amount was based on an intensive review of the evidence to arrive at a fair and impartial allocation of responsibility between settling and non-settling parties, and on a careful estimate of total site costs, based on an estimate by an EPA contractor, and was consistent with the non-settlors' own estimates. The consent decree is fair.

1. The Consent Decree is Procedurally Fair

Non-settlors have objected to the Consent Decree's procedural fairness because they were not included in the Decree. The non-settlors have for over four years failed to enter into settlement negotiations with the United States. Furthermore,

there were many issues in addition to cost-recovery for settlement between the United States and non-settlors. Thus, the United States was not required to include non-settlors in a consent decree involving solely cost-recovery.

a. The United States Was Not Required To Invite The Non-Settlors Into The Same Consent Decree As The Settling Parties

Courts have recognized the discretion traditionally accorded the United States in deciding which defendants to include in settlement of its lawsuits, particularly in CERCLA cases. In United States v. Cannons Engineering Corp., 899 F.2d 79, 93 (1st Cir. 1990), the court of appeals held that:

> The CERCLA statutes do not require the agency to open all settlement offers to all PRPs; and we refuse to insert such a requirement into the law by judicial fiat. Under the SARA Amendments, the right to draw fine lines, and to structure the order and pace of settlement negotiations to suit, is an agency prerogative. After all, "divide and conquer" has been a recognized negotiating tactic since the days of the Roman Empire, and in the absence of a congressional directive, we cannot deny the EPA use of so conventional a tool. So long as it operates in good faith, the EPA is at liberty to negotiate and settle with whomever it chooses.

The court also stated that "Congress intended to give the EPA broad discretion to structure classes of PRPs for settlement purposes," Id. at 86, and "we do not believe that Congress meant to handcuff government negotiators in CERCLA cases by insisting that the EPA allow polluters to pick and choose which settlements they might prefer to join." Id. at 87. See also United States v. Serafini, 781 F. Supp. 336, 339 (M.D. Pa. 1992) ("the

government may, if it chooses, deny parties any opportunity to settle their liability.")

The Cannons court also rejected the non-settlors' claim that the settlement lacked procedural integrity because they were neither allowed to join the decree nor informed in advance that they would be excluded. 899 F.2d at 86-87. In Cannons, the EPA had set a dividing line of 1% or more of hazardous waste volume for including parties in the particular settlement. In the instant case, EPA included in the settlement all parties who were not performing the remedial action pursuant to the EPA Order, and whose liability included only monetary claims. That group included one defendant, Kruger-Ringier, in addition to the third-party defendants. EPA never precluded the non-settling group of defendants from proposing a separate settlement. Indeed, responding to non-settlors' complaints after this settlement, the United States' counsel outlined such a settlement proposal four months ago. The group of non-settlors, however, again failed to respond with a group settlement proposal.

Defendants have cited no case which required the United States to include them in this Consent Decree. Sherwin-Williams' claim in its Comments, pp. 7-14, of a procedural due process right to be notified and to participate in a settlement rests on cases which have nothing to do with settlement of litigation.[3]

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[3] Fuentes v. Shevin, 407 U.S. 67 (1983), involved the constitutionality of state statutes permitting private parties to replevin property without a prior hearing. Moseanko v. Yeutter, 944 F.2d 418 (8th Cir. 1991), involved the constitutionality of (continued...)

b. Non-Settlors Are in a Different Group Than the Settlors

EPA issued the UAO in 1990 after the non-settlors declined EPA's proposal that they enter into a settlement to perform the remedy and reimburse the United States' costs. Non-settlors also failed to make any settlement offer in the following years, despite inquiry from the United States. Indeed, the United States was advised that they remained unable even to agree among themselves on an allocation of costs. They never informed the United States that a global settlement involving all parties to the case was imminent. Indeed, the United States understands that the settling parties will advise the Court that after extended discussions, a global settlement was never within reach. The United States can hardly be accused of denying defendants, who consistently declined to settle, an opportunity to enter into a settlement. And even if non-settlors had asked to join in the same settlement with the settling parties, the United States would have had sound reasons to require them to enter into a separate settlement.

In Cannons, the United States was permitted to distinguish among parties based on the volume of waste they sent to the site. In this case, the United States has distinguished among parties based upon whether they were respondents of EPA's UAO to perform

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[3](...continued)
Farmers Home Administration procedures to collect and offset administratively delinquent loans. Goldbeck v. City of Chicago, 782 F.Supp. 381 (N.D. Ill. 1992), involved the constitutionality of a policeman's 3-day suspension without a hearing.

the site remedy. There are different remedy-related legal and factual issues which must be settled between the United States and the remedy-performing non-settling parties, in contrast to the situation between the United States and the cost-reimbursing settling parties. Thus, even if the non-settlors had approached the United States during the four years before this settlement, the United States would have had a sound basis to say "we would like to settle with you, but there should be a separate settlement which also resolves additional issues between us which are not present in a settlement with the other parties."

Congress has mandated that remedial action consent decrees contain particular settlement terms, see 42 U.S.C. § 9622, and EPA has published a model consent decree embodying provisions generally required in a settlement for remedial action.[4] More specifically, besides agreeing to perform the remedy, non-settlors would have to agree on numerous other provisions unique to remedial action decrees, and not generally part of cost recovery decrees such as the instant one. Such provisions include subjects such as EPA periodic review of the remedy, quality assurance, sampling and data analysis requirements for the remedy, access requirements to the site, reporting requirements regarding the remedy, response to emergencies during performance of remedy, Agency approval of submissions, assurance of ability to complete the work, requirements for a certificate

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[4] Interim Final Model CERCLA RD/RA Consent Decree, 56 Fed. Reg. 30996 (July 8, 1991).

of completion of the remedy, indemnification and insurance for the remedial action, effect of force majeure on the remedial action, dispute resolution for remedial action, stipulated penalties for failure to meet consent decree milestones, records retention, and community relations. In short, settlements contemplating the performance of remedial action result in consent decrees that typically run 75-80 pages in length, in stark contrast to the relatively short, straight-forward cost-recovery decree now before the Court.

In addition, any settlement with non-settlors should resolve potential claims by them, pursuant to CERCLA §§ 106(b)(2), 111, 112 and 113, 42 U.S.C. §§ 9606(b)(2), 9611, 9612 and 9613, against the United States for reimbursement of their costs of performing the remedy.[5] Thus, even had the non-settlors actually expressed interest in settlement, the United States would have been fully justified in entering into a separate consent decree with them, and not including them in the same cost-recovery consent decree with the settling parties who are not engaged in remedial action at the site.

c. There Was no Procedural Unfairness In Disclosure Of the United States' Settlement Allocation

Non-settling defendants claim that the Decree is not fair and reasonable because after lodging the Decree, the United States did not disclose to the non-settlors detailed allocation

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[5] See, e.g., Comment of BASF and OXY USA, p. 11.

data for each settling party.[6] They claim that this prevented informed comment on the Decree.

Non-settlors are wrong for a number of reasons. They used Freedom of Information Act Requests to attempt to obtain confidential settlement documents. The United States responded that the documents were privileged, and also that they were unnecessary to evaluate the Decree.[7] Defendants could, and did, easily take the dollar amounts from the Decree for the estimated total costs at the site, $7.3 million (¶ 3.b.), and the amount paid by settling parties, $2.94 million (¶ 4), to calculate the 40% allocation by EPA to the settling parties and 60% allocation to non-settlors. They did not need separate percentages for each of the 18 companies to know the 60%-40% allocation on which the settlement was based, or to argue whether that allocation was fair and reasonable. They also had all underlying deposition and documentary evidence used as a basis for the settlement, if they wanted to argue that the 40% share for settling parties was too small. Their comments confirm that they were able to make the simple calculation of 40%. (See Sherwin-Williams' Comments, pp. 16-17; Specialty Coatings' Comments, pp. 5-7.)

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[6] Specialty Coatings Comments, pp. 2, 6-8, 7 n. 12; Sherwin-Williams Comments, pp. 7-8.

[7] However, when non-settlors suggested that separate share data for each company might help them to settle among themselves an allocation of their liability, the United States turned over the data under a confidentiality agreement. This disclosure does not appear to have produced the desired result, as the United States has not received a settlement proposal from the group, or to suggestions for a settlement with the entire non-settlor group made by United States' counsel after lodging of the Decree.

As the discussion below demonstrates, the United States' allocation between settling and non-settling parties was fair and reasonable. Whether, after the settlement is made, EPA releases separate percentage shares for each party cannot affect the nature of the Decree itself as fair, reasonable or consistent with CERCLA. Nevertheless, this Memorandum includes below, the United States' detailed allocation of each settling and non-settling party's share, and defendants can use this information in their response to this Motion.

2. The Consent Decree is Substantively Fair

Non-settlors make two primary objections to the Consent Decree's fairness. Sherwin-Williams objects to the allocation by the United States of costs between the settling parties and non-settlors. (Sherwin-Williams' Comments, pp. 14-40) Non-settlors also claim that the settlement amount is too low because the United States underestimated the cost of the remedial action at the site. (Specialty Coatings' Comments, p. 3; Sherwin-Williams' Comments, pp. 15-16) Their objections are without merit.

a. EPA is Given Substantial Deference in Making Allocations

Courts have given great deference to allocations of liability by EPA among responsible parties in a CERCLA case. The Court of Appeals for the First Circuit set forth the legal standard to review an EPA allocation which was contested by non-settling parties. United States v. Cannons Engineering Corp., 899 F.2d 79 (1st Cir. 1990). It stated that:

> It appears very clear to us that what constitutes the best measure of comparative fault at a particular Superfund site under particular factual circumstances should be left largely to the EPA's expertise. Whatever formula or scheme EPA advances for measuring comparative fault and allocating liability should be upheld so long as the agency supplies a plausible explanation for it, welding some reasonable linkage between the factors it includes in its formula or scheme and the proportionate shares of the settling PRPs. . . . [T]he chosen measure of comparative fault should be upheld unless it is arbitrary, capricious, and devoid of a rational basis.

Id. at 87.

The court further held that substantial deference should be given EPA in actually assembling and weighing the data to apportion liability. It stated:

> We also believe that a district court should give the EPA's expertise the benefit of the doubt when weighing substantive fairness--particularly when the agency, and hence the court, has been confronted by ambiguous, incomplete, or inscrutable information. . . . As long as the data the EPA uses to apportion liability falls along the broad spectrum of plausible approximations, judicial intrusion is unwarranted -- regardless of whether the court would have opted to employ the same data in the same way.

Id. at 88.

District courts have consistently given deference to the expert administrative agency's allocation of liability. United States v. Asarco, Inc., 814 F. Supp. 951, 955 (D. Colo. 1993) ("The manner in which the government has apportioned liability should be upheld whenever there is a reasonable, good faith basis for it."); United States v. Acton Corp., 733 F. Supp. 869, 873

(D.N.J. 1990) ("Court, however, will not make an independent evaluation of the relative toxicity of the Intervenor's waste as compared to the settling defendants' waste. This inquiry is well beyond our scope of review."); United States v. Bliss, 32 ERC 1759, 1768 (E.D. Mo. 1990) ("EPA apportionment of liability . . . 'falls along the broad spectrum of plausible approximations,' and so should not be judicially second-guessed."); United States v. Rohm & Haas Co., 721 F. Supp. 666, 685-86 (D.N.J. 1989) ("when a settlement is based on a plausible interpretation of the record evidence, and there has been no clear error of judgment, we do not believe that it is appropriate for the court to substitute its judgment for that of . . . the EPA and the Department of Justice.").

The United States submits that, as in the above cases, this Court should give substantial deference to the allocation reflected in the Consent Decree.

b. EPA Made a Thorough Assessment Of the Allocation Evidence

Of the seventeen defendant and third-party defendant waste generators in this case, only one, Sherwin-Williams, criticized the United States' allocation of responsibility for waste. Sherwin-Williams claims the allocation places too large a percentage on the non-settlors, primarily itself. None of the other four non-settlors has objected to the allocation percentage.

At the outset, it should be made clear that estimating the amount of hazardous waste any company sent to a waste site decades ago is not an exact science. Written documentation is often scarce or non-existent. Memories of truck drivers, waste handlers and others are often hazy and sometimes inconsistent. Every litigant has an incentive to use that often hazy and ambiguous record to minimize the amount of waste it sent to a site, while maximizing the amount others sent, to make itself responsible for a smaller share of the costs of remediating the site. In most cases, however, the generator defendants are able to sift the evidence and make the compromises necessary to fashion a settlement. In this case, unfortunately, the defendants and third-party defendants were unable to do that.

The United States, however, was the only neutral and disinterested party in the case when it came to estimating the amount of waste for which each defendant or third-party defendant was responsible. Moreover, U.S. EPA is an expert agency with vast experience at numerous hazardous waste sites. The United States made a substantial effort to impartially sift the evidence and make the necessary estimates and compromises to fashion this settlement.

As set forth in the attached declaration of Thomas Jacobs (Attachment C), EPA made reasonable, objective assumptions and judgments with respect to the available evidence tying parties to the site. The United States relied on extensive evidence from depositions, affidavits, business records, documentary evidence

and discovery responses not only from the United States' action against defendants, but also from defendants' third party action. James D. Cross, the owner/operator of the pail and drum recycling operation at the Site was deposed by the parties over a four month period in 1992 and previously in 1983. Parties also deposed Cross employees A.D. Brags, Michael Robinson, Terrence Robinson, and Frank Robinson, in addition to employees of all parties to this action. Over eighty depositions were taken by the parties. The United States, with expert assistance, developed substantial knowledge of the operations of the paint and ink manufacturing industry, and of the parties' businesses. The United States also examined shipping and receiving records for pick-ups and deliveries by Cross and/or his employees at many of the parties' facilities. These records, along with the depositions, affidavits and interviews, gave the United States the basis to make a fair and reasonable estimate of the volumes of hazardous waste from each party. Based on this material and the analysis described below, the United States estimated the eleven Settling Parties' share of liability for waste found at the site to be 40.07%, and the six non-settlors' share to be 59.93%. (See Jacobs decl'n., ¶ 11)

To estimate the amount of waste any generator sent to the Cross Brothers site 15 or 20 years ago, difficult questions had to be answered. How long did the generator's waste go to the site -- 5 years, 7 years? During this time, how often was waste picked up -- once a week, 3 times a month, or with different

frequencies in different months? In each waste pickup, what was the volume of drums and/or pails -- 2, 4, 8, or different numbers each time? How full was each drum or pail -- full, 3/4, 1/2, "partly," residues on the sides and bottoms, or some or all of these?

Hazardous waste was transported to the Site predominantly in two kinds of containers -- 55-gallon drums and 5-gallon pails. In order to estimate contributions by each generator, the United States made a number of reasonable approximations.

Drums. Each 55-gallon drum sent to the Site was assumed to have contained 45 gallons of material. This was based on testimony from witnesses employed by waste generators, together with certain drivers, that not all drums were full; and also on testimony of James Cross that at some of his stops, 75-80% of the drums were full (Cross 1992 Dep. at 200), and that at other facilities there were "some full, some empty" drums (Cross 1992 Dep. at 160, 181). The 45-gallon figure was deemed a reasonable average of drum contents.

Pails. Each 5-gallon pail, frequently referred to as "empty pails," sent to the Site was estimated to contain 5/16 gallon of material. James Cross testified that the amount of residue typically contained in a pail was in the range of one to two inches, or a "couple of inches" (Cross 1992 Dep. at 56, 139, 170, 181). Similarly, employees of various PRPs testified that "empty" pails actually contained residues in the bottom and on the sides (see e.g., R. Kraak Dep. at 46-50). A 1.5 inch level

of residue in a standard 5-gallon pail, 24 inches in height, is equivalent to 5/16 of one gallon.

Number of Containers. The terms used in deposition testimony to describe amounts shipped, frequency, and duration of pickups were sometimes vague and imprecise. Time periods may have been given in respect of a decade (e.g., "late 60s"), frequency of pickup was often expressed in terms of "not very often" or "once in a while," and the number of containers was frequently stated as "a few" or "several hundred." After considerable analysis, in light of evidence of Cross Brothers' operation as scavengers and commercial suppliers, and considering reasonable estimates of the generators' output of containers, the United States applied the following estimates in using this testimony:

"Few" or "some" pails = 50 pails (one palletful)
"Few hundred pails" = 300
"Couple hundred pails" = 200
"Not very long in (decade)" = 2 years
"Mid" part of decade = 5 years
"End of," "late," or "early" decade = 3 years
"Some drums" or "yes" to whether drums transported = 10 drums per trip
"Not very often" = once a month

(See Jacobs decl'n, ¶¶ 7-10).

The estimates were arrived at without reference as to how they would affect a particular party's share, and applied consistently to the parties. Based on these assumptions and a thorough review of the deposition and documentary evidence, the United States estimated for purposes of settlement the following

volumes and allocable percentage shares of total waste at the Site for each listed generator:

SETTLING PARTIES

	Percent	Gallons
A&B Container:	28.18%	527,850
Ball Corporation		
Container Corporation of America		
Bagcraft Corp. of America		
Allied Signal	0.27	5,000
Beazer East	1.40	26,190
Perry Printing	0.62	11,542
Federated Paint Manufacturing Co.	1.68	31,500
Grow Group	1.39	25,988
ZENECA	1.20	22,500
INX International	1.97	36,900
R.R. Donnelley	0.08	1,406
Krueger Ringier	3.30	61,734
SUBTOTAL	40.07%	750,610

NON-SETTLING PARTIES

Frederick Levey/OXY	1.44%	27,067
Glidden	6.90	129,262
Inmont/BASF	1.04	19,500
Martin Senour	10.12	189,560
Sherwin-Williams	32.93	616,875
Specialty Coatings	6.75	126,450
Valspar Corporation[8]	0.75	14,062
SUBTOTAL	59.93%	1,122,776
TOTAL	100.00%	1,873,386

Sherwin-Williams is the only non-settlor objecting to the allocation of forty per cent of estimated total site costs to the settling parties. It claims that the amount attributed to it (33%) and a division, Martin-Senour (10%), was too high, and the

[8] The United States pursued environmental claims against Valspar in its bankruptcy proceeding.

amount attributed to A & B Container trans-shipments from three other generators was too low.

A&B Container. Sherwin-Williams has selectively used evidence to arrive at the highest possible estimate for the amount of waste from A&B Container. It relies primarily on testimony of George and Richard Drobut, two A&B Container employees, while ignoring testimony of James Cross that disagrees with Sherwin-Williams' inflated volume assumptions. The United States, however, did consider James Cross' 1983 testimony on the volume of waste taken from A&B to the Cross Site.

Richard Drobut testified that the Cross people were not watched or supervised, and the number of drums they took wasn't checked. (R. Drobut Dep. 176)[9] George Drobut said he "never paid attention" to how many drums Cross took. (G. Drobut Dep. 56) Thus, the Drobuts admitted that they did not know how many drums Cross removed from the A&B site ("Nobody knows" how many drums he took -- R. Drobut, 87; "It would be impossible to estimate how many he took" -- G. Drobut, 56). Instead, they offered guesses as to the number of drums Cross might have taken from A&B based on the size of Cross's truck. (R. Drobut, 88; G. Drobut, 56) Moreover, the Drobuts, as well as Cross himself, stated that Cross would fill up his truck on the way back to his property. (G. Drobut, 23; Cross, 198) The number of drums he took each time from A&B depended on the room left in the truck after previous pickups from other customers. Because he often

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[9] Cited pages of depositions are contained in Attachment D.

only "topped off" his truck, Sherwin-Williams' assumption of twice-weekly, 20-50 drum, full-loads greatly overstates A&B's volume.

Although in his 1992 deposition cited by Sherwin-Williams, Cross did not recall the quantity of drums that he picked up on each trip to A&B, he had a clearer recollection 9 years earlier in his 1983 deposition. There, Cross stated that he would pick up "five, ten sometimes at a time" from the A&B site (Cross 1983 Dep. SW 118). Cross also testified that sometimes he picked up from A&B once or twice per week, and sometimes he did not go to A&B all week. (Cross, 198) Sherwin-Williams ignores this 1983 deposition. In contrast, the Drobuts' testimony is not only more speculative as to the number of drums, it is considerably further removed in time from the actual events. The testimony of all witnesses amply supports the United States' estimate that Cross took an average of 85 drums per month from A&B.[10]

Sherwin-Williams, again looking only at evidence that favors it, relies on an affidavit of John Jagiella, operator of Calumet Container, to argue that virtually all of A&B's wastes went to the Cross site and only a small number of drums ended up at other destinations. The United States, however, weighed testimony that substantial amounts of A&B waste went to sites other than the Cross site. The Drobuts both testified that they brought drums

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[10] Although Sherwin-Williams claims that Cross took drums from A&B for 13-14 years, there is no evidence that A&B was in operation before 1969, and A&B closed in 1981.

to Calumet for more years (1972-1981, when A&B closed, rather than 1975-1978 as Jagiella states) and with greater frequency (once every week or two rather than monthly as Jagiella states). (R. Drobut Dep. 124-25; G. Drobut Dep. 71-74) George Drobut testified that A&B sold truckloads of 35 drums to Calumet during the 1970s, until A&B closed in 1981. (G. Drobut Dep. 71, 73-74) Richard Drobut, who drove the truck, corroborated bringing a truckload of drums to Calumet once a week or once every two weeks. (R. Drobut Dep. 124-25) Thus, ample evidence of large shipments to Calumet confirms that the Cross site was not the only disposal location for A&B waste, and supports the reasonableness of the United States' estimate for A&B.

Sherwin-Williams. Sherwin-Williams again selectively uses evidence to make the lowest possible estimate of the amount of waste taken from the Sherwin-Williams plant to the Site. The United States again weighed evidence ignored by Sherwin-Williams to make a reasonable, balanced estimate. Witnesses associated with Sherwin-Williams claim none of its drums were taken to the Site.[11] However, Cross Brothers employees Frank and Terrence Robinson testified, based on first-hand knowledge, that large numbers of drums were removed by Cross Brothers from the Sherwin-Williams facility over a long period of time.

The Robinsons participated in loading Cross Brothers' trucks at Sherwin-Williams' facility. In a November 1980 statement to

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[11] Sherwin-Williams' Comment does not deny shipments of its pails to the Cross site.

IEPA, Frank Robinson stated Cross would remove "approximately 20 fifty five gallon drums full of what I believe to be solvents." (F. Robinson Dep. Ex. 2) Frank Robinson corroborated this in his deposition, and confirmed that they visited the plant "three times a week." (F. Robinson Dep. 45, 115, 187-88) Furthermore, Robinson stated that "the majority" of what they removed from Sherwin-Williams was drums. (Id. at 187) Terrence Robinson testified that Cross Brothers visited Sherwin-Williams "twice, three times a week." (T. Robinson Dep. 27) They would often pick up mixed loads of pails and drums; but when picking up only drums, their trailers could hold 40 drums, and 80 drums when double-stacked. (Id. at 23-25) Although the Robinsons' testimony justified a higher volume, the United States concluded that an average of 20 drums per week was a reasonable estimate for Sherwin-Williams for this settlement.

Sherwin-Williams, however, ignores the Robinsons' inconvenient testimony by claiming that none of its drums went to the site.[12] The United States used their testimony among other evidence to make a reasonable estimate of Sherwin-Williams' waste contribution. The United States also made a conservative 8.5 year estimate of the time period of collection from Sherwin-

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[12] Sherwin-Williams cites Richard Dykstra, a disposal contractor located in the garage area of the Sherwin-Williams plant, to claim that Cross Brothers never took drums from that facility (see Sherwin-Williams' Comments, p. 33). But Dykstra's activities were primarily in the garage area of the plant, and he was there for only about three hours a day (Dykstra Dep. 35-37). The Robinsons testified that they took drums off of rows of trailers parked in another area of the plant (see T. Robinson, 21-22, 59; F. Robinson, 45-50, 184-88).

Williams. This is less than estimates by Richard Dykstra (pp. 34-35) and by Cross (1983 J. Cross Dep., SW00112; 1992 J. Cross Dep. 310-11) of a period that begins as early as 1967 or the "last part of the '60's" and runs as late as 1980.

Thus, the United States submits that it conscientiously reviewed the available evidence and made fair and reasonable estimates of the amounts of waste from Sherwin-Williams, A&B Container, and each other settling and non-settling party.

c. EPA Made a Reasonable Estimate of the Costs of the Remedy

Two non-settlors -- Specialty Coatings and Sherwin-Williams -- claim that the Decree is unfair because the United States underestimated total response costs, specifically the Non-settlors' costs of performing the remedial action.[13] Thus, they claim, they may be subject to disproportionately large liability. Even if this were true, it would not be a valid objection to this Decree. Cannons, 899 F.2d 79, 91-92 ("Congress explicitly created a statutory framework that left non-settlors at risk of bearing a disproportionate amount of liability."); In re Acushnet River & New Bedford Harbor Litig., 712 F. Supp. 1019, 1027, 1032 (D.Mass. 1989); see also United States v. Rohm & Haas Co., 721 F. Supp. at 696 (determined settlement to be a reasonable and fair compromise, although a risk that settlors would pay a share lower than their volumetric share).

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[13] Specialty Coatings objects to the allocation between Settling and Non-Settling parties, but this is based upon its cost estimate for response costs in connection with the site.

However, the United States submits that the settlement did not create such disproportionate liability for non-settlors. The United States and settling parties based the settlement on estimated total response costs at the Site of $7,390,363 (the Settling Parties' payment of $2,942,232 amounts to a 40.07% share of the estimated total response costs of $7,390,363). Specialty Coatings and Sherwin-Williams, however, estimate that total response costs will be between $8,806,889 and $8,909,269.

In making its estimate of approximately $7.4 million, the United States added: 1) United States' past costs of $2,644,845, 2) United States' estimated future oversight costs of $285,000, and 3) its $4,460,518 estimate of past and future response costs of the non-settlors to perform the remedial action at the Site pursuant to EPA's February 8, 1990 UAO. To accurately estimate the non-settlors' response costs, EPA engaged an expert and experienced environmental contractor, Ecology & Environment, Inc. (Jacobs decl'n. ¶ 6) This contractor was EPA's oversight contractor at the site, and thus had intimate knowledge of the remedial action. The estimate was done in June 1993 and based on remedial design plans by the non-settlors that were 95% complete. At this 95% design stage, the non-settlors themselves had set forth the activities that would be done to remediate the Site. EPA's cost estimate also accounted for such factors as interest, inflation, design revisions, field changes, overhead and profit.

This estimate was consistent with non-settlors' own previous estimates. In Certain Third-Party Plaintiffs' Memorandum of Law

in Opposition to Valspar's Motion for Abatement or Stay and Separate Trial, filed on October 1, 1992, p. 5, in which both Specialty and Sherwin-Williams joined, the non-settlors estimated that their response costs pursuant to the 106 Order would be $2-3 million. On November 30, 1992, Specialty joined in a Motion for Injunction, pp. 4-5, in which Non-Settlors estimated their total response costs to be $3-4 million.

Specialty and Sherwin-Williams now claim that the Non-Settlors' total response costs will be between $5,864,656 and $5,967,036. Yet, they presented no evidence to support their new claim. In fact, their estimate of $5,864,656 is almost double their most recent response cost estimates. The United States considered the recent $4,460,518 estimate by EPA's contractor in June 1993--just 7 months after the Non-Settlors' own estimate of $3-4 million--to be a reasonable basis for the settlement.

EPA also questions the non-settlors' $700,000 estimate to remediate PCB-contaminated soil at the Site. Considering the volume of soil and typical costs of excavating and remediating PCB-contaminated soils, EPA believes this estimate is high.[14]

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[14] Non-settlors do not detail the basis of their estimate of $608,530-$710,910 for the PCB-contaminated soil remedy (see, e.g., Sherwin-Williams' Comments, p. 15). EPA surmises that non-settlors estimated the cost of excavating and incinerating all of the approximately 210 cubic yards of PCB-contaminated soil at the site. Yet it is likely that EPA will require only soils contaminated with more than 50 parts per million of PCBs, estimated at 7 cubic yards, to be incinerated. Thus the remedy would cost less than estimated by non-settlors. Therefore, the Decree, both as to the settlement sum and the reopener for additional response actions, adequately accounts for the uncertain cost of the PCB clean-up.

Furthermore, some of non-settlors' costs may not be recoverable under CERCLA. To recover their costs, private parties who conduct remedial action must show that their costs are "necessary costs of response incurred . . . consistent with the national contingency plan." CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).[15] The non-settlors spent a large amount of money on a contractor whose work was so inadequate that EPA disapproved the contractor, requiring them to engage a new contractor. Non-settlors also appear to include almost $200,000 of their $818,673 total past costs, now increased to $913,739 (see Specialty Coatings' Comments, p. 4, n.7) for a private investigator and legal services.[16] (See Memorandum in Support of Certain Third Party Plaintiffs' Motion for Partial Summary Judgments on Liability, Cross Brothers-Pembroke Site Statement of Operations, attached to Affidavit of George S. Alt) It is certainly unclear that private parties can recover investigatory costs[17] or attorney fees[18], and there is even less basis that

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[15] The United States, in contrast, can recover all response costs that are not inconsistent with the National Contingency Plan. CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A).

[16] In their comments, Sherwin-Williams and Specialty Coatings misleadingly include these attorney and investigator fees as "remedial design costs" (see Sherwin-Williams' Comments at p. 15) and "Past Costs for Designing the Remedy" (Specialty Coatings' Comments, p. 4).

[17] United States v. Hardage, 982 F.2d 1436, 1447-48 (10th Cir. 1992) reiterated that '"necessary costs of response" must be necessary to the containment and cleanup of hazardous releases,' and affirmed denial of litigation-related costs.

the United States must consider such costs in a settlement. Specialty and Sherwin-Williams also fail to breakdown the costs included in their $5,864,656 - $5,967,036 estimate, which may well include other questionable items. Such "soft" costs need not be considered by the United States in reaching a cost recovery settlement, nor should they be recognized when a Decree's fairness is reviewed.

Specialty also claims that the Decree is not fair because if response costs exceed $7.3 million, the non-settlors performing under the 106 Order may have to bear those costs. The United States, however, made allowance for some cost over-run in its estimate. Furthermore, the expenditure of response costs for the remedial action is under the Non-Settlors' control. They have, and should have, incentives to manage the project to avoid cost overruns or costly mistakes. And if response costs are lower than expected for any reason, including good management by non-settlors, they will reap the benefit, not the Settling Parties.[19]

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[18](...continued)

[18] Private parties' attorneys fees were held to be non-recoverable response costs in FMC Corp. v. AERO Indus., Inc., 998 F.2d 842 (10th Cir. 1993); In Re Hemingway Transport, Inc., 993 F.2d 915 (1st Cir. 1993); Stanton Road Assocs. v. Lohrey Enters., 984 F.2d 1015 (9th Cir. 1993); and recoverable in Donahey v. Bogle, 987 F.2d 1250 (6th Cir. 1993); and General Electric Co. v. Litton Industrial Automation Systems, Inc., 920 F.2d 1415 (8th Cir. 1990), cert. denied, 111 S. Ct. 1390 (1991).

[19] See n. 13. Also, for example, it is not clear that the groundwater pump and treat remedy will require 15 years of operation to reach cleanup levels. It is entirely possible that the remedy will be effective in less time -- such as 10 years. If this occurs, non-settling defendants, not settling parties, will incur a substantial benefit.

Furthermore, the United States required in the Consent Decree, ¶ 6, a "re-opener" that if EPA determines that certain additional response actions are necessary at the site, settling parties shall pay their portion of such additional response costs. Non-settlors thus do not bear alone the costs of additional response actions. Thus, the United States submits that EPA's estimate of total response costs was sound and properly done, and with inclusion of the re-opener, the proposed Consent Decree is fair and reasonable.

C. The Consent Decree is Reasonable

The Cannons court identified at least three standards for assessing whether a settlement is reasonable: 1) the decree's "likely efficaciousness as a vehicle for cleansing the environment," i.e., the technical adequacy of the remedy; 2) whether the settlement satisfactorily compensates the public for the actual and anticipated costs of the remedial and response measures; and 3) the relative strength of the parties' litigating positions. Cannons, 899 F.2d at 89-90. Balanced against these criteria, the proposed settlement clearly is reasonable.

This Consent Decree provides for recovery of the United States' costs associated with the Cross Brothers site; the complaint did not seek injunctive relief for remedial action, which is being done pursuant to EPA's 106 Order. The Decree does recover all of the United States' past costs for the site, and all of the United States' estimated future costs for the site. The proposed settlement is clearly reasonable.

D. The Proposed Consent Decree is Consistent With the Purposes of CERCLA

The primary purposes of CERCLA are to ensure the prompt, effective remediation of contaminated sites and to place the financial burden of site cleanups on the PRPs. Walls v. Waste Resource Corp., 823 F.2d 977, 980-81 (6th Cir. 1987); see also, Cannons, 899 F.2d at 91 (the broad settlement authority conferred upon EPA must be exercised with deference to CERCLA's overarching principles: accountability, the desirability of a clean environment and promptness of response activities). The proposed settlement clearly satisfies these standards. The Decree also satisfies Congress' preference for settlement of CERCLA claims and for reducing the time and expense of litigation. See generally 42 U.S.C. § 9622; cases cited supra at pp. 11-15.

Non-settlors, however, have criticized the settlement, claiming that it does not by itself settle all remaining disputes in the case, i.e. the United States' case against them, and their CERCLA § 107 claim against the third-parties. To the extent that is true, it is not a fault of the Consent Decree, but rather of non-settlers' own inability to reach agreement with the United States, with the third-parties, and even among themselves.

CERCLA recognized the possibility that the United States would enter into partial consent decrees with only some of the defendants and potentially responsible parties at a site. Thus, § 113(f)(2), 42 U.S.C. § 9613(f)(2), provided contribution protection for parties entering a settlement from parties who were not in the settlement. Courts have also recognized that

under CERCLA that there would be partial settlements, and entered numerous partial consent decrees. See e.g., United States v. Cannons Engineering Corp., 720 F. Supp 1027, 1037 (D.Mass. 1989) ("Congress envisioned that there may be a series of different settlements with different PRPs in the course of the same action."), aff'd, 899 F.2d 79 (1st Cir. 1990). The United States was open to a separate settlement with the group of non-settlors performing the remedial action at the site. The fact that there are non-settling defendants, and that some litigation may continue, is an unfortunate result of non-settlors' own recalcitrance; it is not the fault of this Consent Decree, or a basis for objection to the Decree.

The United States' complaint sought reimbursement of response costs and a declaration of non-settlors' liability. If the proposed Consent Decree is entered, most of this case will be mooted since the United States will have recovered its response costs. As for the declaration of liability, motions for summary judgment have been filed, and a decision by the Court on those motions may end the United States' case.

Defendants BASF Corp. ("BASF") and OXY USA ("OXY") also argue that their CERCLA Section 107 action against the settling parties will survive and continue to be litigated, despite the protection from contribution actions afforded by Section 113(f)(2). (Comment, pp. 7-10) This argument is premature and cannot be resolved at this stage of the proceedings. If the proposed Consent Decree is entered, the settling parties likely

will move to dismiss defendants' claims against them. At that time, the Court will have a case or controversy to decide, and the benefit of extensive briefs on the issue.

To the extent that BASF's and OXY's argument goes to the fairness and reasonableness of the proposed Consent Decree, their argument fails. If BASF and OXY are correct in contending that their Section 107 claims will survive, the Consent Decree would have no adverse effect on them at all with respect to this issue. Even if their claims are ultimately determined to be cut off, that result would not be unfair or unreasonable as the settling parties are paying a reasonable share of the response costs for the site, as explained above, and the "quid pro quo" that the statute provides to them expressly includes protection against the claims of others under Section 113(f)(2).

Moreover, BASF and OXY are very unlikely to succeed in their argument that claims asserted under Section 107 rather than under Section 113(f) are immune from the contribution protection afforded by Section 113(f)(2). This highly technical and ill-founded argument has been repeatedly rejected by the courts.[20]

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[20] United States v. Cannons Engineering Corp., 899 F.2d 79, 92 (1st Cir. 1990) (holding Section 113(f)(2) applicable to non-settlers' indemnification claim) stated that liable parties cannot be allowed to effect an "end run" around the contribution protection provisions of CERCLA and defeat the purpose of Congress' CERCLA settlement scheme, simply by avoiding Section 113(f) in the pleading of their claim. Accord, Akzo Coatings, Inc. v. Aigner Corp., 803 F. Supp. 1380 (N.D.Ind. 1992)(rejecting argument that plaintiffs were not liable parties who thus could maintain Section 107 claim and state law restitution claim despite settling defendants' statutory contribution protection), appeal docketed, No. 92-3820 (7th Cir.); Avnet v. Allied Signal,

(continued...)

Nor is there any merit to BASF's and OXY's argument that Section 113(f)(2) doesn't apply to their claims because they are not jointly and severally liable with the settling parties. Their argument is based on a highly speculative factual premise, and reflects a poor understanding of the law on joint and several liability. BASF and OXY admit that the evidence shows that they sent containers to the site (Comment, p. 6), but they still try to claim that their containers didn't contribute to the contamination to be remedied. United States v. Alcan Aluminum Corp., 964 F.2d 252, 270 (3rd Cir. 1992), held that the burden of proof on divisibility of harm and joint and several liability is on defendants. BASF and OXY have failed to cite any cases where a hazardous waste generator which sent waste to a site proved at trial that the harm from its waste was divisible from that of waste sent by all other generators. It is highly unlikely that they would be able to prove at trial that they are not liable.

Yet, if BASF and OXY's argument were accepted, the mere allegation of non-liability could require other parties to go

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[20](...continued)
Inc., 825 F. Supp. 1132 (D.R.I. 1992) (parties cannot avoid effect of contribution protection by denominating their claim as cost recovery); Transtech Indus., Inc. v. A. & Z. Septic Clean, 798 F. Supp. 1079, 1084-87 (D.N.J. 1992) (same), appeal dismissed, 5 F.3d 51 (3rd Cir. 1993); United States v. Pretty Products, Inc., 780 F. Supp. 1488, 1496 (S.D. Ohio 1991) (non-settling liable parties cannot avoid effect of Section 113(f)(2) by denominating their claims as restitution); United States v. Alexander, 771 F. Supp. 830, 840-41 (S.D.Tex. 1991) (Section 113 (f)(2) cannot be avoided by asserting state law claims for relief), vacated and remanded (on sanctions issue), 981 F.2d 250 (5th Cir. 1993); but see, Burlington Northern R.R. Co. v. Time Oil Co., 738 F. Supp 1339 (W.D.Wash. 1990); Key tronic Corp. v. United States, No. C-89-694-JLQ (E.D. Wash., Aug. 9, 1990).

through the very contribution trial that Section 113(f)(2) was intended to protect them from. Moreover, if that argument were accepted as a reason for not entering the Consent Decree with the United States, it would prevent other parties from settling with the United States until after the contribution case has been fully tried. This would be clearly inconsistent with the intent of the settlement provisions of CERCLA.

In the unlikely event that BASF and OXY ultimately can demonstrate that they are not liable for response costs at the site, the statute allows them recourse against the Superfund for reimbursement of response costs which they incur pursuant to an EPA administrative order.[21] Section 106(b)(2) of CERCLA, 42 U.S.C. § 9606(b)(2). In addition, they have recourse against the other non-settling defendants. Thus, the statute adequately protects those who truly are not liable, and it is unnecessary and inconsistent with the statute to deny settling parties the contribution protection afforded by statute or to deny entry of the Consent Decree itself in order to provide that protection.

The Consent Decree is fair, reasonable and consistent with the purposes of CERCLA.

IV. CONCLUSION

The proposed Consent Decree is procedurally and substantively fair, reasonable, and consistent with CERCLA. The

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[21] Persons who incur costs other than pursuant to an EPA administrative order can seek reimbursement pursuant to Section 111(a) of CERCLA, 42 U.S.C. § 9611(a), of necessary response costs which have been preauthorized by the United States.

comments submitted by non-settling defendants provide no basis for the United States to withdraw its consent, or for this Court to withhold entry, of the Consent Decree. Accordingly, the Court should enter the Consent Decree.

Respectfully submitted,

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